

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0257

PINKIE POWE)	
(Mother of KELVIN L. POWE, SR.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AUSTAL USA, LLC)	
)	DATE ISSUED: 10/20/2021
and)	
)	
AMERICAN LONGSHORE MUTUAL)	
ASSOCIATION, LIMITED, C/O AEU)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Ben E. Clayton and Joshua P. Clayton (Clayton Law Firm, L.L.C.), Slidell, Louisiana, for Claimant.

Donald C. Radcliff (Brady Radcliff & Brown LLP), Mobile, Alabama, for Employer/carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order (2017-LHC-01627) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must

affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for Employer for approximately one year and four months as a trade assistant, a position which allows an employee to learn the trade of pipefitting or welding. Tr. at 24, 39. On June 4, 2014, shortly after arriving at work, Decedent told his supervisor he needed to go to the restroom, where he was later found passed out on the floor. Tr. at 43-44; EX 5 at 2. Decedent awoke disoriented, combative, and spitting up blood. EX 5 at 2. Co-workers called for medical help. Despite emergency personnel treatment, Decedent became unresponsive and passed away at the scene. *Id.* The autopsy report stated Decedent died of severe coronary atherosclerosis or atherosclerotic cardiovascular disease. *See* CX 16 at 2.

Claimant is Decedent's mother, with whom he had been living for approximately three years at the time of his death, and who he claimed as a dependent on his taxes. She filed a claim for death benefits under the Act, 33 U.S.C. §909, alleging aluminum fumes and other particulate exposure from welding at work aggravated or hastened her son's death. Claimant testified she drove Decedent to and from work, and he complained about lacking airflow, trouble breathing, and skin irritation. Tr. at 27-31. Employer disputed the claim for benefits.

The ALJ found Claimant established a prima facie case that Decedent was exposed to aluminum fumes while at work, and those fumes could have contributed to or caused his death based on autopsy reports identifying pulmonary particulates containing aluminum and the opinion of Dr. Jerrold Abraham that welding exposure could contribute to cardiac problems or death. Decision and Order at 15; *see* 33 U.S.C. §920(a). He then found Employer rebutted the Section 20(a) presumption with Dr. Robert Middleberg's opinion that Decedent's death was not related to his work exposure but was a result of coronary artery disease. Decision and Order at 15. On weighing the evidence as a whole, the ALJ found both Dr. Abraham's and Dr. Middleberg's opinions credible. Nevertheless, he concluded the opinions of Dr. Middleberg and the medical examiner, who both concluded Decedent's death was caused by coronary artery disease, outweigh Dr. Abraham's opinion. *Id.* at 15-16. He found the evidence does not establish Decedent's work caused or contributed to his death and therefore denied benefits. *Id.* at 16.

Claimant appeals, arguing the ALJ erred in finding Employer rebutted the Section 20(a) presumption and in weighing the evidence as a whole. Employer filed a response in support of the denial of benefits.

Section 9 of the Act provides death benefits to certain survivors, including an employee's dependent parents, where a work-related injury or working conditions causes or contributes to the employee's death. 33 U.S.C. §909; *see Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Where, as here, the Section 20(a) presumption is invoked, the burden shifts to the employer to produce substantial evidence that there is no causal relationship between the employee's injury or death and his employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990). A doctor's opinion, given to a reasonable degree of medical certainty, that a condition is not work-related is sufficient to rebut the Section 20(a) presumption. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds the Section 20(a) presumption rebutted, he must weigh all of the evidence in the record, and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant first challenges the ALJ's finding that Dr. Middleberg's opinion rebuts the Section 20(a) presumption, contending it is based on supposition and not on the actual facts of the case. We reject Claimant's argument.

Employer's burden on rebuttal is one of production, not persuasion; generally, a medical opinion that severs a causal link between a claimant's injury or death and his work is sufficient. *See Bath Iron Works Corp. v. Director, OWCP*, 137 F.3d 673, 674-75, 32 BRBS 45, 46(CRT) (1st Cir. 1998) (doctor's opinion given with a reasonable degree of medical certainty sufficient to rebut the presumption); *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (evidence "casting doubt on the causative link" between the work incident and the injury sufficient to rebut the presumption).

Dr. Middleberg opined Decedent's welding exposure did not cause or contribute to his death, concluding his death was due to coronary artery disease, or possibly excited delirium, a condition associated with illegal drug use. EX 33. The ALJ found Dr. Middleberg's opinion that Decedent died from coronary artery disease consistent with the medical examiner's opinion, and Dr. Middleberg explained Decedent's symptoms were not those associated with aluminum toxicity. Decision and Order at 15; EXs 2-3, 33. The ALJ was not required to reject the entirety of Dr. Middleberg's opinion because he speculated Decedent may have experienced excited delirium from drug use. Rather, an ALJ has the authority to weigh the evidence and is entitled to accept or reject any part of an expert's opinion. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). While the ALJ found Dr. Middleberg's opinion that

illegal drugs may have contributed to Decedent's death not credible,¹ the ALJ nevertheless credited his separate explanation for concluding that work exposures to aluminum did not contribute to Decedent's cardiac death. Decision and Order at 15. Moreover, Employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption.² *O'Kelley*, 34 BRBS at 39. Dr. Middleberg's opinion that welding exposure did not contribute to Decedent's death constitutes substantial evidence sufficient to rebut the presumption. We thus affirm the ALJ's conclusion that Employer rebutted the Section 20(a) presumption.

Claimant also contends neither the ALJ nor Dr. Middleberg adequately addressed the presence of pulmonary particulates containing aluminum silicates consistent with welding that were found in Decedent's lungs, so the ALJ erred in weighing the evidence as a whole. We reject Claimant's challenge. Dr. Abraham acknowledged he could only address the possibility that Decedent's welding exposures could have contributed to Decedent's cardiac problems and death but there was "insufficient information" for him to identify a specific cause of death. CXs 1, 19. Similarly, while Dr. Middleberg did not dispute welding exposure can cause pulmonary and cardiac issues, he stated such toxicity usually only manifests after many more years of exposure than Decedent had and also presents with different symptoms than those Decedent exhibited. EX 33. The ALJ found both Dr. Abraham and Dr. Middleberg to be credible, but gave greater weight to Dr. Middleberg's explanation as to whether aluminum exposure contributed to Decedent's death.³ Decision and Order at 15-16.

The Board is not permitted to reweigh the evidence or to disregard the ALJ's findings merely because other inferences could have been drawn from it. *Pittman*

¹ Postmortem toxicology indicated no ethanol, amphetamines, barbiturates, cocaine, or opiates in Decedent's system, but it did not test for cannabis. CX 16 at 7. Claimant testified she had never known Decedent to take illegal drugs. Tr. at 23-24. Dr. Abraham also disagreed with Dr. Middleberg's opinion because Decedent had no history of drug use and the toxicology report stated there were no drugs in Decedent's system. EX 4.

² Dr. Middleberg's opinion completely excludes Decedent's work exposure as a cause of his death and therefore meets the "ruling out" standard adopted by the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises. *See Brown*, 893 F.2d at 298, 23 BRBS at 24(CRT).

³ As previously noted, the ALJ discounted Dr. Middleberg's suggestion of drug-related excited delirium as an alternative cause of death because it was based solely on accounts of Decedent's behavior but not supported by the toxicological evidence.

Mechanical Contractors, Inc. v. Director, OWCP [Simonds], 35 F.2d 122, 28 BRBS 89(CRT) (4th Cir. 1994). The ALJ explained his reasons for finding Dr. Abraham's opinion outweighed by Dr. Middleberg's and the medical examiner's opinions, and his findings are supported by substantial evidence. He emphasized Dr. Abraham could not definitively state Decedent's death was due to his work exposure, only indicated it was a possibility, which Dr. Middleberg did not dispute. The ALJ rationally accepted Dr. Middleberg's explanation for concluding Decedent's exposure was not due to aluminum toxicity based on the timing of Decedent's death and his limited exposure to aluminum fumes.

Contrary to Claimant's argument, there is no evidence in the record specifically linking Decedent's death with his work exposure. Dr. Abraham only acknowledged the possibility of such a contribution because of the known relationship between aluminum dust exposure from welding and lung disease. CX 1. While a showing that work exposures could have contributed to Decedent's death is sufficient to establish a prima facie case, once the Section 20(a) has been rebutted, as it was here, Claimant bears the burden of establishing by a preponderance of the evidence that Decedent's death was causally related to his employment. *See Hawaii Stevedores v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT). The ALJ reasonably concluded Claimant did not establish such a cause, as he found the preponderance of the evidence establishes Decedent's death was caused by his pre-existing cardiac condition, unrelated to his aluminum dust exposure. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). We affirm the ALJ's conclusion that Claimant did not establish Decedent's death was related to his work as it is rational and

supported by substantial evidence. *See Coffey v. Marine Terminals, Corp.*, 34 BRBS 85 (2000).

Accordingly, we affirm the ALJ's Decision and Order.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge